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NO.

IN THE

SUPREME COURT OF THE UNJITED STATES

GABRIEL ORLANDO GRAJALES,

Petitioner

v.

U. S. ATTORNEY GENERAL

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Eleventh Circuit Court of Appeal erred in denying political asylum and withholding of removal under the statute and the Convention Against Torture where Petitioner was persecuted based upon his political opinion by the FARC guerillas.

CORPORATE DISCLOSURE STATEMENT

No parties are corporations. Sup. Ct. R. 29.6

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gabriel Orlando Grajales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal (App. 5a) is not reported. The Opinion of the Board of Immigration Appeals (App. 12a) is not reported. The Opinion of the Immigration Judge (App. 14a) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was issued on December 10, 2004. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 208(a) of the Immigration and Nationality Act: (App. 1a)
Section 237(a)(1)(B) of the Immigration and Nationality Act: (App. 2a)
Section 241(b)(3) of the Immigration and Nationality Act: (App. 2a)
8 C.F.R. 208.16(c)(2) (App. 4a)

STATEMENT OF THE CASE

Petitioner completed his asylum application in May 2002 and presented it to the then INS. His wife and two children were included in the application. At that time, Petitioner was out of status, however, his wife and children

were in legal immigration status. The INS did not grant asylum to Petitioner, but instead referred him alone to Immigration Court.

At the conclusion of the second day of his Individual Hearing on November 5, 2002, the Immigration Judge denied Petitioner's applications for political asylum and withholding of removal under the statute and the United Nations Convention Against Torture.

Petitioner then appealed the Immigration Judge's decision to the BIA. On December 31, 2003, the BIA affirmed the Immigration Judge's decision, without opinion. Petitioner then timely filed his Petition for Review of the BIA's decision. On December 10, 2004, the Court denied his Petition for Review.

REASONS FOR GRANTING THE WRIT

The Decision below conflicts with the regulations and case law

Political Asylum

To establish eligibility for asylum, an applicant must prove that he or she is a refugee. Kataria v. INS, 232 F.3d 1107, 1119 (9th Cir. 2000), Citing Cordon-Garcia v. INS, 204 F. 3d 985, 990 (9th Cir, 2000). An asylum applicant must demonstrate "persecution or a well-founded fear of persecution on account of [one of five grounds]: race, religion, nationality, membership in a particular social group, or political opinion. Efe v. Ashcroft, 293 F.3d 899, 912 (5th Cir. 2002). The asylum applicant bears the burden of establishing past persecution and a well-founded fear of future persecution based upon one of the five protected

grounds of the Act. INS v. Elias-Zacarias, 502 U.S. 478,481, 112 S. Ct. 812 (1992).

Persecution is defined as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive." Kataria 232 F.3d at 1119, citing Cordon-Garcia, 204 F. 3d at 991 (quoting Singh v. INS, 134 F.3d 962, 967 (9th Cir. 1998).

To establish a well-founded fear of persecution, an applicant must demonstrate both a subjective and an objective fear of persecution. Kataria, 232 F.3d at 1119, citing Mejia-Paz v. INS, 111 F.3d 720, 723 (9th Cir. 1997). An applicant can satisfy the subjective component by credibly testifying that he genuinely fears persecution. An applicant can satisfy the objective component in two ways. Kataria, 232 F.3d at 1119, citing Ladha v. INS, 215 F.3d 889, 897 (9th Cir. 2000). The first way is to prove persecution in the past, giving rise to a rebuttable presumption of a well-founded fear of future persecution. The second way is to "show a good reason to fear future persecution by adducing credible, direct, and specific evidence in the record Kataria, 232 F.3d at 1119, of facts that would support a reasonable fear of persecution." citing Ladha, 215 F. 3d at 897 (quoting Duarte de Guinac, 179 F.3d 1156, 1159 (9th Cir. 1999). The objective requirement can be met "either through the production of specific documentary evidence or by credible and persuasive testimony. Id.

Here, the Court of Appeal stated (App. 9a) that the IJ made a determination that Grajales' subjective fear of persecution was not credible because Grajales' testimony regarding his fear was contradicted by his actions of remaining in his home, leaving Colombia on three occasions and not seeking asylum until the final time, leaving his family in Colombia despite the ongoing threats, and refusing bodyguards. It went on to say that the ALJ did not err in

making its determination. The Court further said that because Grajales' testimony was not deemed credible, Grajales needed corroboration for his asylum claim, which was not provided, although it was readily available.

However, it was not Grajales' testimony that was deemed not credible by the IJ, rather, the IJ said that his subjective fear was undermined by his actions. But not only has Grajales offered reasonable explanations for his actions, but he has also shown that in Ahmed v. Ashcroft, 94 Fed. Appx. 361 (7th Cir. 2004), Lim v. INS, 224 F.3d 929, 935 (9th Cir. 2000), Adriano v. INS, 1999 U.S. App. LEXIS 827, 835 (9th Cir. Jan. 20, 1999), Reyes-Guerrero v. INS, 192 F.3d 1241, 1243-44 (9th Cir, 1999) and Gonzalez v. INS, 82 F.3d 903, 907 (9th Cir. 1996), the Petitioners had all remained in their country for many year after they were threatened. And in Zayas-Marini v. Immigration and Naturalization Service, 785 F.2d 801 (9th Cir. 1986), Marini's return to his country more than once after fleeing in fear was not held against him.

Grajales did provide some documentary evidence as corroboration for his asylum claim. Such evidence was not enough for the Immigration Judge and the Court of Appeals agreed with the IJ. But, not only has Grajales shown that he does have a subjective fear of persecution, he has also shown that in INS v. Stevic, 467 U.S. 407, 104 S. Ct. 2489 (1984), Garrovillas v. INS, 156 F.3d 1010, 1029 (9th Cir. 1998), Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997), Matter of Mogharrabie, 19 I&N Dec. 439 (BIA 1987) and Matter of S-M-J-, 21 I & N Dec. 722 (BIA 1997) corroboration is not always required.

Finally, the Court of Appeal stated (App. 9a) that the IJ's determination that any persecution that Grajales suffered was based on his hiring practices and construction work instead of his political opinion. The Court went on to say that while Grajales obtained his contracts through his

political party and refused to hire anyone not in his party, evidence also supports the findings that he was threatened based on his refusal to hire members of the guerillas and the guerillas' desire for Grajales to complete certain projects. However, the Court of Appeal itself also cited Girma v. I.N.S., 283 F.3d 664, 667 (5th Cir. 2002) (citing Second and Ninth Circuit cases) to say "an applicant need not show past persecution or fear of future persecution 'solely on account of' a protected ground. Stated another way, 'the presence of possible mixed motives falls within a statutorily protected ground." Mixed motives exist here since the guerillas not only wanted to utilize Grajales' services and have him hire their members, but they wanted him to do these things to further their cause, which they knew he did not support. Grajales was persecuted on account of his political opinion and the political opinion imputed to him by the guerillas based upon his engagement in public construction projects and his political work in recruiting party members to his construction team.

Withholding of Removal Under the Statute

An alien is entitled to withholding of removal "if the evidence demonstrates a clear probability that the applicant would be persecuted were he to be deported to his home country." Kataria, 232 F.3d at 1120, citing Duarte de Guinac, 179 F.3d at 1159. "In order to demonstrate a clear probability of persecution, a petitioner must prove that "it is more likely than not that he would be persecuted on account of a statutorily-protected ground." Kataria, 232 F.3d at 1120, Citing Navas v. INS, 217 F.3d 646, 655 (9th Cir. 2000). An alien seeking withholding of removal to any country must show that his life or freedom would be threatened in that country on account of one of the enumerated grounds. Kataria, 232 F.3d at 1120.
The Court of Appeal stated that the standard for withholding of removal under the statute is more stringent than the "well-

founded fear" standard for asylum. The Court went on to say that since Grajales was unable to meet the well-founded standard, he is unable to qualify for withholding of removal.

Adriano and Reyes-Guerrero, discussed supra, were granted withholding of removal. Like the Appellants in Adriano and Reyes-Guerrero, the Petitioner here warrants a grant of withholding of removal because he suffered past persecution and there exists a clear probability that he will suffer future persecution were he to be returned to Colombia. The evidence submitted by Petitioner indicates that he suffered past persecution where the guerillas threatened his life in person, telephonically and through graffiti at the construction sites where he worked because of his political campaigning. They put a bomb in one of the corners of a contention wall project on which he was working. They also kidnapped him and demanded his engineering services to further their cause and activities through repair of roads that they used, and through hiring their members. And even after he left the country, the guerillas made threats to him through his son on two occasions.

The Country Report on Colombia from the State Department details the violent activities of the guerillas throughout Colombia, making it unsafe and unreasonable for Petitioner to relocate. Furthermore, the Colombian Government is unable to control the FARC guerillas.

Withholding of Removal Under the Convention Against Torture

Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits it signatory states from removing "a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture." The United States is a signatory to the

Convention and therefore, pursuant to 8.C.F.R. Sec. 208.16(c)(2), an applicant for relief under the Convention against Torture may not be removed to the stated country if the applicant can establish that it is more likely than not that he would be tortured if he were to be removed to that country.

The Court of Appeal stated that Grajales failed to establish that he would suffer torture with the consent or acquiescence of a public official, so his CAT relief claim failed.

However, the Colombian Government has turned a blind eye to the activities of the FARC guerillas and that rises to the level of acquiescence, as discussed in Zheng v. Ashcroft, 332 F.3d 1186, 1995 (9th Cir. 2003).

CONCLUSION

The Eleventh Circuit Court of Appeal erred in denying political asylum and withholding of removal under the statute and the Convention Against Torture where Petitioner was persecuted based upon his political opinion by the FARC guerillas. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Section 208(a) of the Immigration and Nationality Act:

Authority to Apply for Asylum.-

(1) In general. - Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

(2) Exceptions. -

(A) Safe third country. - Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of alien's arrival in the United States.

(C) Previous asylum applications. - Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed conditions. - An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified in subparagraph (B).

(3) Limitation on judicial review. No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

Section 237 of the Immigration and Nationality Act:

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status.-

(B) Present in violation of law.-Any alien who is present in the United States in violation of this Act or any other law of the United States is deportable.

Section 241(b)(3) of the Immigration and Nationality Act:

(b) Countries to Which Aliens May Be Removed.-

(3) Restriction on removal to a country where alien's life or freedom would be threatened.-

(A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.-Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that-

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that,

notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

8 C.F.R. Section 208.16(c)(2):

(c) Eligibility for withholding of removal under the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELVENTH CIRCUIT

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
December 10, 2004

No. 04-10410
Non-Argument Calendar

BIA No. A95-551-359

GABRIEL ORLANDO GRAJALES,
Petitioner
versus
U.S. ATTORNEY GENERAL,
Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals

(December 10, 2004)

Before TJOFLAT, DUBINA and BARKETT, Circuit Judges.
PER CURIAM:

Gabriel Orlando Grajales petitions for review of the decision of the board of Immigration Appeals ("BIA") affirming without opinion the immigration judge's ("IJ's") final order of removal and denying Grajales's application for asylum and withholding of removal under the Immigration and Nationality Act ("INA") and the United Nations Convention Against Torture, Inhumane or Degrading Treatment or

Punishment ("CAT"), 8 C.F.R. § 1003.1(b)(3). Because Grajales's removal proceedings commenced after April 1, 1997, the effective date of IIRIRA, this case is governed by the permanent provisions of the INA, as amended by IIRIRA. Gonzalez-Oropeza v. U.S. Attorney Gen.. 321 F.3d 1331, 1332 (11th Cir. 2003). Moreover, because the BIA summarily affirmed the IJ's decision without an opinion, the IJ's decision became the final removal order subject to review. See Mendoza v. United States Attorney Gen.. 327 F.3d 1283, 1284 n.1 (11th Cir. 2003) (citing 8 C.F.R. § 3.1(a)(7) (2002), now found at 8 C.F.R. § 1003.1(a)(7)).

The IJ denied Grajales's asylum application, finding that Grajales failed to establish past persecution or a well-founded fear of persecution in Colombia based on his race, religion, nationality, membership in a particular social group or political opinion. In particular, the IJ found that (1) Grajales was not credible and had offered no corroboration that he suffered past persecution, and (2) any alleged persecution was not directed towards Grajales due to his political stance, but as a result of his employment and participation in various public construction projects. The IJ then denied Grajales's request for withholding of removal because, in failing to meet the lower burden of asylum, Grajales also failed to demonstrate that he was entitled to withholding of removal. Finally, the IJ denied Grajales's CAT claim, finding that Grajales failed to establish that any torture he feared in Colombia would be inflicted by or with the acquiescence of a public official or other persons acting in an official capacity. Grajales raises three issues, which we discuss in turn.

First, Grajales argues that the IJ's decision denying him relief was not supported by the evidence and case law. Grajales argues that he was forced to leave the country on two prior occasions because he received real threats, was subjected to very serious threats and was kidnapped based on his political activities, and was credible and provided sufficient documentary evidence to corroborate his testimony.

To the extent that the IJ's decision was based on a legal determination, review is de novo. Mohammed v. Ashcroft, 261 F.3d 1244, 1247-48 (11th Cir. 2001). The IJ's factual determinations are reviewed under the substantial evidence test, and we "must affirm the [IJ's] decision if it is 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" Al Najjar v. Ashcroft. 257 F.3d 1262, 1283-84 (11th Cir. 2001) (citation omitted). "We will reverse the denial of asylum only if the evidence presented by the applicant is so overwhelming 'that a reasonable factfinder would have to conclude that the requisite fear of persecution exists.'" Id. at 1286 (citations omitted, emphasis in original).

An alien who arrives in or is present in the United States may apply for asylum. See INA § 208(a)(l), 8 U.S.C. § 1158(a)(l). The Attorney General has discretion to grant asylum if the alien meets the INA's definition of a "refugee." SeeINA§208(b)(l), 8 U.S.C. § 1158(b)(l). A "refugee" is any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). The asylum applicant carries the burden of proving statutory "refugee" status. See AlNajjar. 257 F.3d at 1284.

To establish asylum eligibility, the alien must, with specific and credible evidence, establish (1) past persecution on account of a statutorily listed factor, or (2) a "well-founded fear" that the statutorily listed factor will cause such future persecution. 8 C.F.R. § 208.13(a), (b); Al Najjar. 257 F.3d at 1287. Although persecution is not defined in the INA, it "is an 'extreme concept,' requiring 'more than a few isolated

incidents of verbal harassment or intimidation,' and '[m]ere harassment does not amount to persecution.'" Sepulveda v. U.S. Arty. Gen., 378 F.3d 1260, 1264 (11th Cir. 2004) (citing with approval to extra-circuit authority defining persecution). "To establish the necessary causal connection between the political opinion and the feared persecution, 'the alien [must] present specific, detailed facts showing a good reason to fear that he ... will be singled out for persecution on account of such an opinion.'" Id. (citations omitted). A "well-founded fear" of persecution may be established by showing (1) past persecution that creates a presumption of a well-founded fear and overcomes any rebuttal by the INS, (2) a reasonable possibility of personal persecution that cannot be avoided by relocating within the subject country, or (3) a pattern or practice in the subject country of persecuting members of a statutorily defined group of which the alien is a part. 8 C.F.R. § 208.13(b)(1), (2).

To establish a "well-founded" fear, the respondent must meet "both an objective and subjective component." Al Najjar, 257 F.3d at 1289. "What this means is that an applicant must demonstrate that his . . . fear of persecution is subjectively genuine and objectively reasonable." Id. "The subjective component is generally satisfied by the applicant's credible fear that he ... genuinely fears persecution. . . . [T]he objective prong can be fulfilled either by establishing past persecution or that he ... has a 'good reason to fear future persecution.'" Id. (citations omitted).

"[A]n applicant need not show past persecution or fear of future persecution 'solely on account of a protected ground." Girma v. I.N.S.. 283 F.3d 664, 667 (5th Cir. 2002) (citing Second and Ninth Circuit cases). "Stated another way, 'the presence of possible mixed motives need not [necessarily] defeat an asylum claim.'" Id. (citation omitted). "An applicant must only show that one of the persecutor's motives falls within a statutorily protected ground." Id.

Credibility determinations are reviewed under the substantial-evidence test. See Gao v. Ashcroft 299 F.3d 266, 272 (3d Cir. 2002); Akimnade v. INS. 196 F.3d 951, 954 (9th Cir. 1999). The trier of fact must determine credibility, and this Court may not substitute its judgment for that of the IJ with respect to credibility findings. Vasquez-Mondragon v. INS, 560 F.2d 1225, 1226 (5th Cir. 1977). "An immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence." Sarvia-Quintanilla v. U.S. INS. 767 F.2d 1387, 1395 (9th Cir. 1985): accord Abdulrahman v. Ashcroft. 330 F.3d 587, 597 (3d Cir. 2003). "Although credible testimony from an applicant "may be sufficient to sustain the burden of proof without corroboration,' when the IJ 'does corroboration,' when the IJ 'does not believe the applicant or does not know what to believe, the applicant's failure to corroborate his testimony can be fatal to his asylum application.'" Zaidi v. Ashcroft. 377 F.3d 678, 682 (7th Cir. 2004) (internal citation omitted). However, "corroboration should be required only as to 'material facts' and only when the corroborative evidence is reasonably accessible." Balogun v. Ashcroft. 374 F.3d 492, 503 (7th Cir. 2004): see also Kaur v. Ashcroft. 379 F.3d 876, 890 (9th Cir. 2004).

In this case, the IJ made a determination that Grajales's subjective fear of persecution was not credible because Grajales's testimony regarding his fear was contradicted by his actions of remaining in his home, leaving Colombia on three occasions and not seeking asylum until the final time, leaving his family in Colombia despite the ongoing threats, and refusing bodyguards. We cannot say that the ALJ erred in making this determination. Because Grajales's testimony was not deemed credible, Grajales needed corroboration for his asylum claim, which was not provided, although it was readily available. Finally, the IJ's determination that any persecution Grajales suffered was based on his hiring

practices and construction work instead of his political opinion is supported by substantial evidence. While Grajales obtained his contracts through his political party and refused to hire anyone not in his party, evidence also supports the findings that he was threatened based on his refusal to hire members of the guerrillas and the guerrillas's desire for Grajales to complete certain projects. See INS v. Elias-Zacarias, 502 U.S. 478, 483, 112 S.Ct. 812, 816, 117 L.Ed.2d 38 (1992) (holding that an asylum applicant may not show merely that he has a political opinion, but must show that he was persecuted because of that opinion).

Second, Grajales argues that the BIA improperly denied his request for withholding of removal. Grajales argues that he demonstrated that he suffered past persecution, thus, it should be presumed that his life or freedom would be threatened if he returned to Colombia. Further, he claims that the government failed to demonstrate by a preponderance of the evidence that the conditions in Colombia have changed to the extent that it is no longer more likely than not that Grajales would be persecuted if he were to return. Moreover, Grajales argues that he could not safely move to another part of Colombia because he feared for his life and guerillas were everywhere in Colombia.

An alien seeking withholding of removal under the INA must show that his life or freedom would "more likely than not" be threatened upon return to his country because of, among other things, his political opinion or membership in a particular social group. See Mendoza, 327 F.3d at 1287; see also INA § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b). This standard is more stringent than the "well-founded fear" standard for asylum. See e.g., AINajjar. 257 F.3d at 1292-93. Because Grajales was unable to meet the well-founded fear standard for asylum, he is unable to qualify for withholding of removal.

Third, Grajales argues that the BIA erred in denying him relief under CAT because he demonstrated that the

government acquiesced in his persecution by turning a blind eye to the activities of the FARC.

To obtain withholding of removal under the CAT's implementing regulations, Grajales must establish that he "more likely than not" will be tortured upon his return to Colombia. 8 C.F.R. § 208.16(c)(2). "Torture" is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. Id. §208.18(a)(l).

Grajales has failed to establish that he would suffer torture with the consent or acquiescence of a public official, so his CAT relief claim fails.

Upon review of the briefs of the parties and all relevant portions of the administrative record, we hold that, as affirmed by the BIA, the IJ's order denying Grajales's application for asylum and withholding of removal and CAT relief is supported by substantial evidence.

PETITION DENIED.

U.S. Department Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 LeesburgPike, Suite 1300
Falls Church, Virginia 22041

Altman, Rita, Esquire **105 South Narcissus Avenue** **Suite 410** **W. Palm Beach, FL 33401-0000**
Office of the District Counsel/MI 155 So. Miami Ave., Rm. 500 Miami, FL 33130
Name: GRAJALES,GABRIEL ORLANDO
A95-551-359
Date of this notice: 12/31/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case

Sincerely,

Jeffrey Fratter
Chief Clerk
Enclosure

Panel Members:

PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A95-551-359 – MIAMI Date: Dec 31 2003

In re: GRAJ ALES .GABRIEL ORLANDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Altman, Rita, Esquire

ON BEHALF OF DHS: Goring, Alex, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. § 1003.1(e)(4).

/s/_____
For the Board

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Miami, Florida
File No.: A 95 551 359
November 5, 2002
In the Matter of)
GABRIEL ORLANDO GRAJALES)
IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 237(a) (1) (3) of the Immigration and Nationality Act - remained longer than permitted.

APPLICATIONS: Asylum pursuant to Section 208(a)(1) of the Immigration and Nationality Act; withholding of removal pursuant to Section 241(b)(3) of the Immigration and Nationality Act; withholding of removal pursuant to Article 3 of the Convention against Torture.

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:
Ms. Rita Altman, Esquire
Attorney at Law
West Palm Beach, FL
Hillel Smith, Squire Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a married, male, native and citizen of Colombia who last arrived in the United States through Miami, Florida on or about October 8, 2001 as a non-immigrant visitor for business with authorization to remain in the United States for a temporary period not to exceed April 7, 2002. The respondent remained in the United States beyond April 7, 2002 without authorization from the Immigration and Naturalization Service. The respondent

was placed in removal proceedings on July 17, 2002 and charged with removability pursuant to Section 237(a)(1)(B) of the Immigration and Nationality Act. There is no issue before the Court regarding the respondent's removability under Section 237(a)(1)(B) of the Immigration and Nationality Act which has been established by clear and convincing evidence. This respondent has declined to designate a country for removal and Colombia has been designated by this Court. The applications by the respondent are asylum, withholding of removal, and withholding of removal under the Torture Convention.

The respondent had initially requested voluntary departure in the alternative under Section 240A(b) of the Immigration and Nationality Act. However, the Court previously deemed the respondent ineligible for voluntary departure in the alternative inasmuch as he lacked the one year of physical presence prior to the service of the Notice to Appear upon the respondent personally on July 17, 2002.

The respondent's asylum application and supplement to this application that are contained within Exhibits 2-A and 5-A reflected that the respondent's wife and two children were present in the United States. In fact, the respondent's wife and two children were present during the proceedings on November 4, 2002 and are present before the Court today on November 5, 2002. The Court's computer database did not reflect that the respondent's wife and two children were under any removal proceedings or before an Immigration Court.

The Court has carefully considered all the evidence of record. Upon such careful consideration and deliberation, the Court respectfully concludes that this respondent has failed to establish past persecution or a well-founded fear of persecution in Colombia on account of his race, religion, nationality, membership in a particular social group or political opinion. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). The Court has respectfully denied this respondent asylum under Section 208(a)(1) of the Immigration and Nationality Act based on the significant and meaningful evidentiary gaps in his asylum claim and for failure of proof. See Matter of Dass, 20 I&N Dec. 120

"(BIA 1989).
On cross-examination the Immigration and Naturalization Service developed that the respondent's original asylum application did not raise a claim of past persecution based on the respondent's alleged past political activities with the Conservative Party of Colombia. The Immigration and Naturalization Service developed through the testimony of the respondent that the asylum application reflected that the particular incidents related by the respondent in his testimony were on account of the respondent's refusal to employ members of the FARC guerrilla organization. The respondent's asylum application in part C question 1 reflects the following: "on various occasions it was necessary to cease labor on our projects due to periodic death threats, intimidation, and assaults made by the FARC with respect to us. These attacks were carried out because we failed to comply with demands by this armed group that they be allowed to dictate who should be employed in the execution of public works in areas where they had influence."
The respondent's asylum application in part C, question 23 reflects the following: "I was threatened with death by the armed guerrilla group (the FARC) on a number of occasions because I was unwilling to employ their guerrilla fighters as laborers on my construction projects."
In the supplement B of the continuation of part C question 1 the respondent indicated the following: "specifically, I was ordered to contribute to the revolutionary cause by repairing a number of roads used by the FARC in their frequent excursions and escapes."
The Court also carefully reviewed the supplement to the asylum application that is contained within Exhibit 5-A. It was in the supplement that the respondent first asserts in written form that his involvement with the political activities of the -Conservative Party were part of the alleged persecution directed towards him by the FARC guerrillas.
Within Exhibit 5-A the respondent presented an Internet -produced letter reflecting the respondent's membership within the Conservative Party. The letter is dated October 11, 2002 by a Carlos Holguin Sardi, president of the National Directory of the

Conservative Party. The respondent indicated that his immediate boss in the Conservative Party was Luis Eduardo Betancour. The respondent indicated that he received Mr. Sardi's letter through Mr. Luis Eduardo Betancour. However, the letter of Mr. Sardi does not reflect that the respondent had any problems or difficulties or any persecution in Colombia based on his activism on behalf of the Conservative Party. The respondent did state in testimony that he related the various incidents of persecution towards him by the FARC guerrillas to his immediate boss which the Court has presumed to have been Luis Eduardo Betancour. However, the respondent has not provided any letter, statement, or sworn affidavit by Mr. Betancour to provide corroboration for the underlying claims of past persecution. The respondent also testified that he was associated with Hernand Villegas-Villegas, but he has also provided no statement, letter or affidavit from that individual from the Conservative Party.

The Court notes that the respondent related several incidents that occurred to him in Colombia. The respondent indicated that in the beginning of July 2000 that some graffiti was written directed towards him in very vulgar language with respect to his involvement with a construction project and allegedly demanded the respondent to cease his political activities. The respondent also related that in November 2000 that a containment wall was dynamited by the guerrillas and the respondent was directed to get out of the area of Montebelo and referred to in a very vulgar manner. The respondent claimed that that incident occurred because he was performing meetings that November 5, 2002 were political in nature with the workers and families on the construction project. The respondent also related in testimony a kidnapping that occurred on or about September 8, 2001. The respondent indicated that he was held for four to six hours and he was threatened with death if he continued to be involved in the construction projects, political activities, and continued to refuse to repair roads in order to allow the guerrillas to escape.

The Court finds that this respondent's subjective credibility is substantially undermined by the fact that the respondent made several trips outside of Colombia subsequent to the alleged incidents

of past persecution directed towards him in Colombia allegedly. After the alleged July 2000 threats towards the respondent, the respondent, his wife and two children left Colombia and traveled through the United States in transit on or about July 24, 2000. The respondent, his wife and two children traveled to Canada on or about July 24, 2000 after stopping in the United States on that date in transit. The respondent and his family then returned to the United States from Canada on or about August 28, 2000 and they remained in the United States until September 5, 2000. The respondent and his family then returned to Colombia on September 5, 2000.

The respondent and his family next came to the United States on December 14, 2000 in transit to Canada. The respondent and his family then returned to the United States from Canada on or about January 14, 2001. The respondent and his family then returned to Colombia on or about January 22, 2001. The respondent testified that he next returned to the United States on or about October 8, 2001 and remained in the United States thereafter. The respondent's passport, copy thereof, is contained within the asylum application in Exhibit 2-A. The Court did question the respondent regarding a stamp in his passport that appeared to reflect that the respondent returned to the United States one day after arriving in Colombia on or about January 22, 2001. Page 6 of the respondent's passport reflects a B-2/B-1 stamp with a date of January 23, 2001. The respondent could not provide any explanation for that apparent admission stamp in the passport on page 6 reflecting that the respondent went to Colombia on January 22, 2001 and allegedly returned to the United States on January 23, 2001.

Although the respondent claimed that he had been the target of death threats from the FARC guerrillas beginning in July 2000 directly and beginning in January 2000 indirectly through his workers, the respondent did not seek asylum in the United States or Canada during his trips to both countries in July 2000, December 2000 and January 2001. The respondent explained to the Court that he did not apply for asylum in the United States previously because he was hoping that the situation in Colombia would die down and improve. However, the Court finds that the respondent's failure to seek asylum or refugee protection in the United States or Canada in his trips to

both countries prior to October 8, 2001 substantially undermine a credibility of the respondent's subjective claim of fear of past persecution and fear of future persecution in Colombia.
The respondent explained to the Court that his family did not come to the United States until March 24, 2002 for economic reasons. The Court notes that the respondent has given no indication that his family has filed an independent asylum application with the Immigration and Naturalization Service although they are included in the respondent's asylum application. This respondent had many opportunities to seek asylum and refugee protection in the United States and/or Canada, although the respondent claims that he eventually fled Colombia because of persecution towards himself and his family by the FARC guerrillas.
The respondent indicated in testimony that he was kidnapped on September 8, 2001 by FARC guerrillas and held for four to six hours and threatened with death if he failed to comply with the demands of the guerrillas. The respondent explained that four other workers were present during the kidnapping at the worksite, yet, the respondent was unable to provide any explanation as to why the authorities did not become aware of the respondent's kidnapping or disappearance for four to six hours. The Court also notes that the respondent did not report the alleged kidnapping to the police authorities. He has indicated that he did not report the kidnapping for lack of trust of the police in Colombia. However, the respondent has provided the Court with no corroborating documentation to in fact credibly support his claim that he was kidnapped on or about September 8, 2001. The letter by Mr. Sardi does not reflect that the respondent was kidnapped or that he was kidnapped for political reasons.
On cross-examination the Immigration and Naturalization Service developed that the respondent returned to Colombia in January 2001 and remained in that country for approximately eight to nine months until October 8, 2001 despite prior alleged threats against his life by the FARC guerrillas. The Immigration and Naturalization Service further developed on cross-examination that between January 2001 and October 2001 the respondent did not leave Colombia and continue to live and work in that country. The Service additionally developed on cross-examination that the respondent and his family did not change their residence, despite the

alleged threats of persecution towards the respondent, particularly beginning in the year 2000. The asylum application for the respondent reflects that he resided with his family at 56-70 Cerros De Guadalupe from November 1999 through to October 2001 in part A on page 2. The respondent had claimed that after the July 2000 threat by the FARC guerrillas that he had gone into hiding but the respondent indicated that such hiding constituted restriction of the movements of himself and his family. He stayed in the same house with his family in Cali, Colombia. Moreover, the Service also developed that the respondent's family remained in the same home in Cali subsequent to the respondent's departure from Colombia on or about October 8, 2001 although the respondent claimed that he had been kidnapped on September 8, 2001.

The respondent claimed in testimony that he commenced his career as a civil engineer in 1991. However, the respondent's asylum application in part *C* question 1 reflects that the respondent commenced his career as a civil engineer in 1997.

The respondent further indicated that he was an independent civil engineer in Colombia with his own business which he referred to as Engineering and Techno Construction Company. The respondent indicated that he was the president of that company and that there was no vice president. The respondent, however, has not provided the Court with any corroborating documentation reflecting the existence of his company, Engineering and Techno Construction Company. The respondent indicated that he did not obtain evidence of his business from the Chamber of Commerce in Colombia. Within Exhibit 5-A the respondent presented evidence of two contracts that the respondent apparently successfully completed. The first contract was dated December 7, 1998 and the other March 9, 2000. The respondent has not provided the Court with any documentation to support his claim that he held contracts for his company subsequent to the year 2000. In addition, the photographs identified by the respondent within Exhibit 7-A reflect construction projects in the year 2000. The Court has no evidence before it, some documentation of any construction projects the respondent was involved in subsequent to the year 2000.

The respondent also claimed that the bombing of the containing wall occurred at the end of the month of November 2000. However, the respondent also has not provided corroborating documentation regarding that alleged bombing.

The respondent indicated in testimony that approximately five of his former workers are deceased. However, he could not state the motives behind the alleged killings of his five former workers.

While the respondent has provided a letter from Mr. Sardi, the respondent has not provided the Court with any documentation as to any classes he conducted or any exact political activities that he was participating in upon which this Court can judge the plausibility of his claim in that regard.

The respondent has not demonstrated to this Court that he and his family could not live elsewhere safely in Colombia, in another neighborhood in Cali or in another city. The respondent did indicate that his son received two threatening phone calls towards the respondent on March 4 and on March 10, 2002, respectively. The respondent had initially indicated that those calls occurred in the year 2001 and changed his testimony upon the part of his wife who was present in Court. In any event, the respondent did not provide much detail with respect to the nature of those calls or the testimony of his son in that regard.

The Court also is not convinced that any alleged persecution directed towards the respondent was on account of any of the grounds specified in Section 101 (a) (42) (A) of the Immigration and Nationality Act. The Court finds that if any threats were directed towards the respondent they were on account of his employment and participation in various public construction projects. The Court does note in that regard that the alleged incidents occurred outside the area of Call and on location of the various construction projects.

The respondent has not demonstrated to this Court that he ever sought the protection of the Colombian government during his performance of any public construction contracts or that the Colombian government is unable to provide any protection to him while performing the completion of any of those contracts.

Based on the foregoing discussion the Court would respectfully deny this respondent asylum under Section 208(a)(1) of the Immigration and Nationality Act. Inasmuch as the respondent has failed to meet the lower burden of asylum he has failed to meet the

higher burden for withholding of removal pursuant to Section 241(b) (3) of the Immigration and Nationality Act.
The respondent has likewise failed to meet his burden of establishing eligibility for withholding of removal pursuant to Article 3 of the Convention against Torture. The respondent has failed to establish that any torture he fears in Colombia would be inflicted by or with the acquiescence of a public official or other persons acting in an official capacity. See In re S-V-, Int. Dec. 3430 (BIA 2000). The protection under the Torture Convention does not extend to persons who fear entities that a government is unable to control. See id.
The following orders will be entered.

ORDERS

IT IS HEREBY ORDERED that the respondent's applications for asylum and withholding of removal pursuant to Sections 208 (a) (1) and in 241(b)(3) of the Immigration and Nationality Act are hereby respectfully denied.
IT IS FURTHER ORDERED that the respondent's application for withholding of removal pursuant to Article 3 of the Convention against Torture is hereby respectfully denied.
IT IS FURTHER ORDERED that respondent be removed from the United States to Colombia under the charge of Section 237(a)*(I)* (B) of the Immigration and Nationality Act as contained in the respondent's Notice to Appear dated July 17, 2002.

	DENISE MARKS LANE
	United States Immigration Judge

November 5, 2002